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Supreme Court of the United States

OCTOBER TERM, 1959

No. 239

BADGER MUTUAL INSURANCE COMPANY and NORTHWESTERN MUTUAL FIRE ASSOCIATION,
Petitioners,

versus.

SAM SERIO, d/b/a MAGNOLIA CANNING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF CASE	5
ARGUMENT	6
CERTIFICATE	36
APPENDIX:	
Appendix "A", Opinion of the Court of Appeals for the Fifth Circuit, Dated May 5, 1959	37
Appendix "B", Oral Opinion of the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, Directing Judgment for Petitioners	44
Appendix "C", Letter Opinion of the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, Overruling Respondent's Alternate Motion for a Judgment Notwithstanding the Verdict or for a New Trial	49

SUBJECT INDEX—(Continued)

PAGE

Appendix "D", Letter Opinion Filed June 9, 1958 54

Appendix "E", Judgment Entered May 5, 1959 56

Appendix "F", Order Denying Rehearing Entered June 4, 1959 57

TABLE OF CASES

Baratti v. Baratti, 242 P. 2d 22, 24, 109 Cal. App. 2d 919 10

Blakeney v. State, 228 Miss. 162, 87 So. 2d 472 33

Byrne v. Matczak, 143 F. Supp. 881 15

Campbell v. American Foreign S. S. Corp., 116 F. 2d 926, 928 24

English v. Mattson, 214 F. 2d 406, 409 30

Ferrell v. Trailmobile, 223 F. 2d 968, CCA 5 ..... 6, 11, 14, 15

Foster v. Rosamond, 180 So. 334, 337 20

Gilleo v. Campbell, 250 P. 2d 373 (Cal.) 10

Haffenberg v. Grossberg, 32 N. E. 940 22

Henderson v. Edwards, 183 N. W. 584 ..... 19, 29

King v. Leach, CCA 5, 134 F. 2d 8, 9 28

Klapprott v. United States, 69 S. C. 384, 335 U. S. 601, 93 L. Ed. 266 ..... 10, 11, 33

Mullong v. Mullong, 152 N. W. 994, 178 Iowa 552 17

Prudential Ins. Co. v. Gilroy, 154 F. 2d 382 31

Sheen v. Kubiac, 131 Ohio St. 52, 1 N. E. 2d 943, 944 26

Slappey v. U. S., CA 5, 110 F. 2d 528 31

Stathatos v. Arnold Bernstein S. S. Corp., CA 2, 201 F. 2d 525, 527 9

Taylor v. Ross, 10 A. L. R. 2d 377 26

TABLE OF CASES—(Continued)

	PAGE
Tozer v. Charles A. Krause Milling Co., 189 F. 2d 242, 245	29
United States v. Bransen, 142 F. 2d 232	25
Woolworth, F. W., Co. v. Seckinger, 125 F. 2d 97, 98	31
Zarneke v. Kitzman (So. Dak.), 183 N. W. 867	18

TEXTS AND STATUTES.

39 American Jurisprudence 168, Sec. 161	27
39 American Jurisprudence 177, Sec. 171	23
50 American Law Reports 2d 1012	16
Barron & Holtzoff, Vol. 3, p. 248	8
California Code of Civil Procedure, Sec. 473	9, 13
46 Corpus Juris 257, Sec. 227	17, 30
46 Corpus Juris 270, Sec. 238, New Trials	15
39 Corpus Juris Secundum 177, Sec. 171	16
66 Corpus Juris Secundum 307	16
66 Corpus Juris Secundum 316	16
66 Corpus Juris Secundum 307, Sec. 108	28
Rule 1	11
Rule 60 (a)	11
Rule 60 (b)	4, 8, 9, 11, 32
Rule 60 (b)(1)(2)(6)	2, 3
United States Code, Sec. 1254(1), New Title	3
United States Code, Sec. 2072	4
Words & Phrases of Federal Digest	16

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit dated May 5, 1959, has now been reported in 266 F. 2d 418. A copy thereof is attached as Appendix "A". No opinion was rendered by the Court of Appeals for

the Fifth Circuit on entering judgment denying Petition for Rehearing.

An oral opinion was rendered by the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, directing the jury to enter a verdict for the petitioners here. The opinion was not reported, but is incorporated in the certified transcript of the record filed by petitioners (R. 565), and a copy is attached to this Petition as Appendix "B".

A letter opinion of the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, overruling Respondent's Alternate Motion for a Judgment Notwithstanding the Verdict or for a New Trial was rendered, and was not reported. However, the same is incorporated in the certified transcript of the record filed by petitioners (R. 583) and a copy is attached to this Petition as Appendix "C".

A letter opinion by the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, overruling the Motion of Respondent here to reopen the case under Rule 60(b)(1)(2)(6) was rendered and was not reported. However, the same is incorporated in the certified transcript of the record filed by petitioners (R. 632) and a copy is attached to this Petition as Appendix "D".

JURISDICTION.

The judgment of the Court of Appeals of the Fifth Circuit, vacating judgments of the District Court of the United States for the Southern District of Mississippi, Jackson Division, was entered on May 5, 1959 (R. 649). A copy of said judgment is attached hereto as Appendix "E".

The judgment of the United States Court of Appeals for the Fifth Circuit denying a Petition for Rehearing was entered on June 4, 1959 (R. 684). A copy thereof is attached hereto as Appendix "F". The mandate was stayed on June 17, 1959, and the order thereon is included in the certified transcript of the record filed by petitioners (R. 689).

The jurisdiction of this Court is invoked under New Title 28, United States Code, Sec. 1254(1).

QUESTIONS PRESENTED.

The only question presented for review by this Court on certiorari is the question of whether or not the Court of Appeals for the Fifth Circuit erred in reversing and remanding this case to the United States District Court for trial upon its merits in response to the request of the respondent, by motion of respondent to reopen the case under Rule 60(b)(1)(2)(6).

STATUTES INVOLVED.

New Title 28, United States Code, Sec. 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Court of the United States and of the District Court for the Territory of Alaska in civil actions * * *

"* * *

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Rule 60(b):

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the opera-

tion of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, Sec. 1665, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT OF CASE.

The final judgment was entered on September 13, 1957. Motion for judgment notwithstanding the verdict, or in the alternative for a new trial, was filed within ten (10) days and an order overruling this motion entered February 21, 1958.

On April 2, 1958, Serio filed his motion for relief from the final judgment and from the order overruling his alternative motion for a judgment notwithstanding the verdict or for a new trial alleging that in the interim he had, through accident, found his records, the absence of which on the trial had operated to forfeit his policies. The motion is sustained by his affidavit and the affida-

vit of others and the proceedings in regard to the motion for relief and the action of the Court of Appeals in sustaining this motion comprised the dispute now being presented to this Court on petition for a writ of certiorari (Tr. 604-634).

The final judgment was entered on September 13, 1957. Motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, was filed within 10 days and an order overruling this motion entered February 21, 1958.

On April 2, 1958, Serio filed his motion for relief from the final judgment and from the order overruling his alternative motion for a judgment notwithstanding the verdict or for a new trial, alleging that in the interim, he had, through accident, found the records, the absence of which on the trial had operated to forfeit his policies. The motion is supported by his affidavit and the affidavits of others and the proceedings in regard to this motion for relief, comprising the second appeal, appear (Tr. 604-634).

ARGUMENT.

The District Judge, in his opinion, (Tr. 632), did not question his jurisdiction and power to hear the motion.

We submit, *Ferrell v. Trailmobile*, 223 F. 2d 698, CCA 5, as a guide.

We set out the *object and purpose* of the iron safe clause as providing the best means of ascertaining with

reasonable certainty, the amount of the loss and the extent of the insurer's liability, and to provide a business method whereby the rights of the parties may be adjusted and determined.

The failure of Serio to have the records at the trial, presumably operated, in the court's judgment and under the authorities construing the iron safe clause in favor of the insurer to the prejudice of the appellees. The iron safe clause prohibits parol testimony to supply information the records would properly show, and under the general rule relating to the application of the iron safe clause, the only parol evidence is that which would operate to explain the method of bookkeeping, as the books of the merchant reflect the fluctuating inventory. In effect, the Courts say that the merchant can speak only through his books as to the contents of his building destroyed by fire. He must remain mute, according to the strict construction of the iron safe clause, save to explain his methods of bookkeeping. The rule, strictly applied, is similar to a corporation or a governmental agency which speaks only through its minutes.

The insurance companies argue prejudice, where a deficiency in the books is attempted to be explained by parol evidence. The corollary of this, therefore, is that if the books are made available, there can be no prejudice, irrespective of when they turn up, and the insurer has in no wise changed its position and has in no wise been prejudiced, and its sole interest should be whether the books are or are not authentic. The District Court, in disposing of the motion for relief, as-

sumed the authenticity of the books but held that under Rule 60(b) there was a *lack* of diligence, and the presence of negligence on the part of the appellant in failing to produce them at the trial.

On a new trial, the appellant could introduce his books and records and then remain mute except to explain, if need be, the method by which they were kept. If the policies are to be forfeited because of prejudice to the insurance company for failure to produce the books, that reason disappears when the books are produced and the sole issue would be whether the books are genuine and clearly reflect the business transacted at the place of business.

We submit the jury would be the one to pass upon the authenticity of the books if that point should be raised, and a certified public accountant would pass upon whether they accurately reflect the contents of the building when the building was destroyed.

Serio, in his motion for relief, invoked under Rule 60(b): (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence and (6) *any other reason.*

We direct the Court's attention to Barron & Holtzoff, Vol. 3, P. 248, in regard to the discretionary powers of the Court, where it is said:

> "* * * the discretion should ordinarily incline towards granting rather than denying relief, especially if no intervening rights have attached in

reliance upon the judgment and no actual injustice will ensue. * * *"

No intervening rights have attached in reliance upon the judgment forfeiting the policies, and no injustice has ensued. No prejudice has been done to the appellees. The appellees insisted at the trial that the insured stand or fall upon his records and the appellant not having all of them, the appellees prevailed. Now the appellant produces all the records. Assuming, as did the Court below, that the books are authentic and considering the statement of Evan Gallagher, Certified Public Accountant, (Tr. 606), that the records appear to be the original and authentic records, the respondent, we submit, should have a denial of the petition for certiorari so that the records may be submitted to the Court and Jury on a new trial.

Rule 60(b) was modeled on Section 473 of the California Code of Civil Procedure which restricted the grounds for relief to mistake, inadvertence, surprise, or excusable neglect. California decisions have provided a useful interpretative guide for the Federal Courts as to Clause 1 of Rule 60(b).

Whatever the ground, the process under Rule 60(b) "leads only to a new trial, a step settled to be not reviewable." *Stathatos v. Arnold Bernstein S. S. Corp.*, CA2, 201 F. 2d 525, 527.

A recent California decision giving definition of these four terms as picked up from former decisions of its

Court is *Baratti v. Baratti*, 242 P. 2d 22, 24, 109 Cal. App. 2d 919, where it is said:

> "*A mistake of fact* is when a person understands the facts to be other than they are; a mistake of law is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts. People v. Kelly, 35 Cal. App. 2d 571, 574, 96 P. 2d 372. *Inadvertence* is defined as lack of heedfulness or attentiveness, inattention; fault from negligence. Webster's New Inter. Dict., 2d Ed; Greene v. Montana Brewing Co., 32 Mont. 102, 79 P. 693, 694. Inadvertence in the abstract is no plea on which to vacate a default. Shearman v. Jorgensen, 106 Cal. 483, 485, 39 P. 863. The 'surprise' referred to in Code Civ. Proc. Sec. 473 is defined to be 'some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.' Miller v. Lee, 52 Cal. App. 2d 10, 16, 125 P. 2d 627, 631. The 'excusable neglect' referred to in the section is that neglect which might have been the act of a reasonably prudent person under the same circumstances. Elms v. Elms, 72 Cal. App. 2d 508, 513, 164 P. 2d 936." (Italics ours.)

Also see *Gillee v. Campbell*, 250 P. 2d 373 (Cal.)

Rule 60(b) is liberally construed.

The Supreme Court of the United States in *Klapprott v. United States*, 69 S. C. 384, gave effect to F. R. C. P. 1, which reads:

"They (referring to the rules) shall be construed to secure the just, speedy and inexpensive determination of every action." (Italics ours.)

In *Klapprott v. United States*, *supra*, the Court considered the plight of a German naturalized citizen and gave him relief under Rule 60(b)—Clause 6. This German had been naturalized, but his naturalization had been revoked and he was ordered to be deported. In the interim between the time of the order and its attempted enforcement, he had been accused, found guilty and imprisoned for violation of the Subversive Acts and of the Selective Service Act, and because of his imprisonment and his poverty, was unable to get legal assistance. The Court gave him relief under the 6th clause, that is, the clause relating to "any other reason."

Rule 60(b) is consistently liberally construed for the purpose of giving substantial justice, and in *Ferrell v. Trailmobile*, 223 F. 2d 697, the 5th Circuit gave effect to F. R. C. P. 1 in liberally construing F. R. C. P. 60(b).

As stated *supra*, the process contemplated under Rule 60(b) leads only to a new trial, whereas 60(a) leads to correction for clerical error.

The granting of a new trial is ordinarily addressed to the sound discretion of the trial judge, and refusal to grant one will not be claimed in absence of the abuse of discretion, but we also understand the appellate courts are more inclined to reverse for refusal than to affirm where there has been a refusal.

The basis of Serio's motion for relief is new evidence described in his motion, which new evidence was discovered by accident under the circumstances shown by the affidavits attached to the motion.

The rule in regard to the granting of a new trial for newly discovered evidence is well settled in both state and Federal courts, the distinction in criminal cases being that the new evidence in criminal cases must be of such nature that it would raise a reasonable doubt of the accused's guilt, and in civil cases would most likely produce a different result for the losing party.

The criteria for granting a new trial on the basis of newly discovered evidence in civil cases are:

(a) The evidence must be in fact newly discovered, that is, discovered since the trial, and must have been in existence at the time of the trial.

(b) Facts must be alleged from which the Court may infer diligence on the part of the movant.

(c) The evidence relied upon must not be cumulative or impeached.

(d) It must be material to the issues involved.

(e) It must be of such a nature that on a new trial the newly discovered evidence would probably produce a different result.

It is obvious to us, and we trust to the Court, if the new evidence is what the motion and affidavits say it is that it fully meets the requirements of (a), (c), (d) and (e).

In this motion, with deference, we are relying upon everything upon which we can rely, but particularly 60(b), Clause 2, "Newly Discovered Evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)," and Clause 1 "Mistake, inadvertence, surprise, or excusable neglect".

The California Courts, in construing its Code of Civil Procedure, Section 473, have given definitions to the terms used in Clause 1 of Rule 60(b).

Diligence or lack of diligence are relative terms incapable of exact definitions and what would be diligence or lack of diligence under one statement of facts falls short under another set of circumstances.

It is difficult to think of the term excusable neglect except in terms of diligence or lack of diligence, and to think of the term surprise, unless one thinks in terms of lack of knowledge or notice. For neglect to be excusable it would appear that one must look to see whether there was or was not diligence to make it excusable.

We cannot conceive of a person being charged with lack of diligence where he is ignorant of facts and had no knowledge of the facts.

Serio, under the terms of the policies, was obligated to have and produce the records for inspection, and to produce them at the trial, but he defaulted in this obligation because of his utter ignorance of the fact they were still in existence after the fire. He did not know otherwise until, through accident, he discovered them while searching through an old shed for hard-backs or covers in which to bind his records at the McComb store.

Having no knowledge of their existence, how can he be charged with a lack of diligence in not having them at the trial, and how could it be said that by due diligence he could have discovered them in time to have used them on his motion for a new trial which was filed within ten days of the judgment in September of 1957?

We submit he should be given an opportunity to show to the Court that he believed and had good cause to believe under the allegations of his motion and the facts alleged by his witnesses in their affidavits that the records were not in existence by reason of their destruction by fire at the time of the trial.

There have been a number of cases where documents in existence at the time of the trial have been found after the trial, but their mere finding did not always give to the losing party a right to a re-trial if the Courts found lack of due diligence in discovering them. But our 5th Circuit, in *Ferrell v. Trailmobile*, *supra*, reversed and remanded on a motion for relief under Rule 60(b) on evidence which appears to us to have

been merely cumulative, being in the form of photostatic copies of post office money orders in existence at the time of the trial. The 5th Circuit did not charge the appellant with lack of due diligence in that case, and with regard to diligence of the appellant there said: "In such a case, the ends of justice may require granting a new trial even though proper diligence was not used to secure such evidence for use at the trial." Citing authorities.

The District Judge, in *Byrne v. Matczak*, 143 F. Supp. 881, 885, directed attention to the above quote from *Ferrell v. Trailmobile* in deciding there was no need to consider the matter of due diligence.

Serio's original records are primary records, and under the wording of the iron safe clauses in the policies involved in this suit, secondary evidence was not admissible in evidence and could not be received by the Court.

In 46 C. J., 270, Sec. 238, New Trials, it is said:

> "A new trial may be allowed where an important document or book, which was lost at the time of the trial and was not found on due diligent search, has been discovered since and the evidence as to its execution of contents was seriously conflicting."

Citing authorities from eight states—Illinois, Kansas, Kentucky, New York, South Carolina, South Dakota and Texas.

The same text appears in 66 C. J. S. 316, citing an additional case from South Dakota.

There have been cases according to 39 C. J. S. 177, Sec. 171, where new trials have been granted for newly discovered or cumulative evidence because it was probable that the effect of such evidence would be to produce a different verdict on a new trial.

It seems odd that forgetfulness of a party to a suit of facts of which he did not testify at the trial, would be ground for a new trial later, but such instances have occurred, as shown by the annotations in 50 A. L. R. 2d 1012, et seq.

We find in Words & Phrases of the Federal Digest numerous cases in which the term "excusable neglect" is defined and given substance. These cases in substance simply reiterate the California rule that excusable neglect is that which might have been the act of a reasonably prudent person under the same circumstances.

We submit there can be no lack of diligence on Serio's part for his failure to find or have available records which he thought were lost.

66 C. J. S. 307 says, among other things:

> "So, also, the fact that a party moving for a new trial for newly discovered evidence, consisting of a receipt for the debt sued on, said nothing in his testimony of the receipt does not preclude a new

trial if satisfactorily explained by showing that he had thought it lost." (Citing *Mullong v. Mullong*, 152 N. W. 994, 178 Iowa 552.)

In other cases the excuse of apparent lack of diligence has been held sufficient. (This is a carry-over of the same text from 46 C. J. 257, Sec. 227.)

The showing of diligence on the part of the defendant in the *Mullong* case, *supra*, is as follows:

"I further state that, while uncertain about the matter, I thought I had a receipt for the money paid by me as herein stated, but I could not find the same before the trial of said action, having searched for the same through my papers and where I usually kept my papers and receipts. I further state that the said receipt must have been inside of some other paper, as when I emptied out all the papers in a valise in which the same was, it fell out upon the floor from other papers. I further state that I searched through the same papers for the receipt before the trial of said action, and did not find the same, and decided that it had been lost. From the fact that I failed to find the receipt when I searched for it leads me to the conclusion that the same was inside of some other papers, and I failed to discover the same. I further state that if I could have found the said receipt, I would have produced the same upon the trial of said action."

The Iowa Court, thinking this good cause for a new trial, said:

"Of course, a motion for a new trial is addressed to the sound discretion of the trial court, but this

is a legal discretion, and subject to review by us, *and this court reviews a case with greater care where a new trial is denied than where it is granted, for the reason that, where denied, the case is at an end, while, if granted, a new trial is had.* (Citing authorities.) We are of opinion that a new trial should have been granted, and the order denying the same must be, and it is, reversed." (Italics ours.)

The Court will thus see in this case that the defendant knew he lost receipt at the time of the trial but did not find it until after the trial, and that the defendant at the trial made no reference to the receipt nor did he ever undertake to introduce secondary evidence in regard to it.

In *Zarneke v. Kitzman* (So. Dak.), 183 N. W. 867, the lost document was a letter which did not turn up until after the trial. The Court, affirming an order granting a new trial, said:

"It is not cumulative evidence. Oral evidence as to its contents was secondary—the letter itself is primary. Mullong v. Mullon, 178 Iowa, 552, 159 N. W. 994. *In an action on a note which, during the trial, was supposed to have been lost, the instrument itself thereafter discovered was held not to be cumulative evidence, being of a higher grade than that produced at the trial.* Platt v. Munroe, 34 Barb. (N. Y.) 291. *In another case the terms of an insurance policy were in issue at the trial. The discovery of the policy itself was held sufficient to justify the granting of a new trial.* Protection Life Insurance Co. v. Dill, 91 Ill. 174; Tucker v.

Wyoming Coal Min. Co., 18 Wyo. 97, 104 Pac. 529; Mitchell v. Bass, 26 Tex. 372; Guth v. Bell, 153 Iowa, 551, 133 N. W. 883, 42 L. R. A. (N. S.) 692, Ann. Cas. 1913 E. 142.

"In this state a new trial may be granted on the ground of newly discovered evidence material to the party making the application which he could not with reasonable diligence have discovered and produced at the trial. Subdivision 4, Sec. 2555, Code 1919. Upon such an application the matters to be considered are whether the evidence is 'newly discovered' and 'material' within the meaning and purview of the statute. In this case the alleged newly discovered evidence is the written instrument itself, as well as its contents. We are of the view that where a written instrument evidentiary in character, has been *lost or mislaid*, through excusable mistake or inadvertence, and could not with due diligence be made available at the trial, and where such instrument is subsequently found or discovered, it may properly be considered as newly discovered, within the meaning of the statute, and that this view is sustained by the decisions above cited. Waite v. Fish, 17 S. D. 215, 95 N. W. 982." (Italics ours.)

In *Henderson v. Edwards*, an Iowa case, 183 N. W. 583, 584, an appeal was taken from a judgment and order denying motion for a new trial, the motion for a new trial being based on the primary ground of newly discovered evidence. The Court said:

"The right to a new trial on the ground of newly discovered evidence is statutory, and a ruling upon the motion involves legal discretion, and, or-

dinarily, the ruling of the trial court will not be disturbed on appeal unless a reasonably clear case of abuse of discretion is presented. Mullong v. Mullong, 173 Iowa, 552, 159 N. W. 994.

"Code Sec. 3755, provides:

"'The former report, verdict or decision, or some part or portion thereof, shall be vacated and a new trial granted, on the application of the party aggrieved, for the following causes, affecting materially the substantial rights of such party * * * 7. Newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial.'

"If it can be said that in all probability the newly discovered evidence will not affect the result in case of a second trial, then the motion should be denied. If the proffered evidence presents material facts germane to the issue in controversy, which considered with the evidence presented on the trial, might cause a jury to take the other view, then the motion should be sustained. Dobberstein v. Emmett County, 176 Iowa 96, 155 N. W. 315. True this is speculative, but nevertheless the rule states a reasonably safe guide."

In an Alabama case, *Foster v. Rosamond*, 180 So. 334, 337, the newly discovered evidence consisted of a check known to be in existence but which was not found until after the trial. The defendant described in detail his efforts to find the check before and after the trial and how he suddenly found it in his wife's desk. The higher court affirmed the judgment granting the new trial on a rehearing and overruled an ap-

plication for a rehearing, and in the latter opinion said, among other things:

"It further appears from the evidence that the check had in some way gotten into the desk of defendant's wife and among her papers, where it was not natural for him to look in trying to find the check.

"The order of the Court in granting the motion for the new trial is based upon the discovery of this new evidence—which the Court considered material, warrants the granting of this motion."

"We are of the opinion that the evidence disclosed all the diligence that is required necessary for a predicate in the introduction of newly discovered evidence, and the only question for us to determine is to whether or not the check is merely cumulative of the testimony which had been given in the main trial.

"In the case of Mullong v. Mullong, 178 Iowa, 552, 159 N. W. 994, 995, a case in all respects similar to the case at bar, the Iowa Court, after holding facts testified to as being a sufficient predicate, held: 'Cumulative testimony is testimony of the same kind and to the same point. The testimony does go to the same point; that is to the fact of payment but it is not of the same kind. The testimony adduced at the trial was oral, and directed to the fact of payment, giving the circumstances thereof; the newly discovered testimony is written, and amounts, if the receipt is genuine, to an admission on the part of plaintiff that he did receive the money from defendant. Manifestly the newly discovered testimony was not cumulative.'

"To the same conclusion is the case of Bullard v. Bullard, 112 Iowa 423, 84 N. W. 513; Guth v. Bell, 153 Iowa 511, 133 N. W. 883, 42 L. R. A., N. S., 692, Ann. Cas. 1913E, 142; Smith v. Smith, 160 Iowa 111, 140 N. W. 659; to which may be added as persuasive of the proposition, West Virginia Land Co. v. May, 166 Ala. 127, 52 So. 315; 46 Corpus Juris 257. From all of which we conclude that cumulative evidence is of the same kind and character, and where the newly discovered evidence is of a higher type or character, it cannot be classed as merely cumulative so as to prevent a trial judge from basing his action in granting a new trial for and on account thereof."

The lost document in *Haffenberg v. Grossberg*, 32 N. E. 940, was a check that had been lost for many years and the motion for a new trial or bill of review was filed long subsequent to the final judgment and accounting between the parties. The Court, among other things, said:

"The law applicable to bills of review because of newly discovered evidence presents no serious difficulty. *Where a showing is made that the newly discovered evidence is of decisive importance and not merely cumulative, leave to file the bill should be granted.* Hupp v. McInturf, 4 Ill. App. 449, 451; Drawdy Inv. Co. v. Robinson, 96 Fla. 397, 118 So. 157; Mullong v. Mullong, 178 Iowa 552, 159 N. W. 994; Winfield Bldg. & Loan Ass'n v. McMullen, 49 Kan. 493, 53 p. 481." (Italics ours.)

It is our contention in this law suit that the newly discovered evidence is primary evidence and is not im-

peaching evidence or cumulative evidence, and that if it had been available at the time of the trial of the case, we believe with all deference that this Court would have granted Serio a directed verdict, although the probabilities further are that had the records been available there would not have been a lawsuit at all.

We direct the Court's attention to a line of authorities supporting this statement in 39 A. J. 177, Sec. 171, on the probative effect of newly discovered evidence on a motion for new trial:

> "The mere fact that alleged newly discovered evidence tends to prove the same facts as did testimony which was admitted at the trial does not necessarily require a conclusion that it is insufficient to constitute ground for a new trial. Notwithstanding the fact that it is cumulative, yet its probative effect may be such as to produce a result differing from that of the trial which has been had. *And the authorities hold that a new trial should be granted for newly discovered cumulative evidence where it is probable that the effect of such evidence will be to produce a different verdict on retrial.*
>
> "In some of the cases, it has been asseverated that a new trial will be granted for newly discovered cumulative evidence which is positive and conclusive. Also, it has been observed that cumulative evidence, in order to be ground for a new trial, must be sufficient to render clear and positive that which was before equivocal and uncertain, or that it must be such as to render a doubtful case clear. And in still other cases it is said that cumulative evidence is a ground for new trial 'when the point

was left doubtful by the testimony, and the newly discovered testimony will remove all doubt.' But a court will not grant a new trial on account of newly discovered evidence, no matter how conclusive its character, or how independent and dissimilar its nature, upon a point already established, where no more evidence was wanted or could be of use." (Italics ours.)

In *Campbell v. American Foreign S. S. Corp.*, 116 F. 2d 926, 928, the Court said:

"The appeal from these orders must be dismissed. The granting or refusing of a new trial is a matter resting within the discretion of the trial court and will be reviewed only for a clear abuse of discretion. Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 482, 53 S. Ct. 252, 77 L. Ed. 439; American Lumberman's Mut. Casualty Co. of Illinois v. Timms & Howard, Inc., 2 Cir., 108 F. 2d 497, 504; McIntyre v. Texas Co., 2 Cir., 48 F. 2d 211; Royal Ins. Co. v. Eastham, 5 Cir., 71 F. 2d 385, 389, certiorari denied 293 U. S. 557, 55 S. Ct. 110, 79 L. Ed. 658. Viewed as a motion under Rule 59, 28 U.S.C.A. following section 723c, for a new trial for newly discovered evidence, there was no abuse of discretion in denying it. The facts alleged in support of the motion do not constitute 'newly discovered evidence' within the rule. *That phrase refers to evidence of facts in existence at the time of the trial, of which the aggrieved party was* excusably ignorant. If it were ground for a new trial that facts occurring subsequent to the trial have shown that the expert witnesses made an inaccurate prophecy of the prospective disability of the plaintiff, the litigation would never come to an end. The

weight of authority is against the granting of a new trial on the ground of unexpected improvement in the plaintiff's condition, unless the evidence is sufficient to show fraud. Rogers v. Goforth, W. Va., 2 S. E. 2d 903; Woods v. Kentucky Traction & Terminal Co., 252 Ky. 78, 65 S. W. 2d 961; Johnson v. Rule, 105 Ct. 249, 164 A. 681; Nebelung v. Norman, 14 Cal. 2d 647, 96 P. 2d 327; Amalfi v. Post & McCord, Inc., 250 App. Div. 408, 294 N.Y.S. 633. Viewed as a motion under Rule 60 to set aside the judgment for fraud the denial of it was also proper. There was not the slightest evidence of fraud in procuring the judgment." (Italics ours.)

In *United States v. Brausen*, 142 F. 2d 222, the Court said:

"'Newly discovered evidence' within Civil Procedure Rule 59, 28 U. S. C. A. following section 723c, refers to evidence of facts existing at time of trial, of which aggrieved party was *excusably ignorant*, Campbell v. American Foreign S. C. Corporation, 2 Cir., 116 F. 2d 926, certiorari denied 1941, 313 U. S. 573, 61 S. Ct. 959, 85 L. Ed. 1530. All of these alleged offers of sale apparently had been in the possession of appellant for about a year before the trial and, if pertinent, by the exercise of reasonable diligence could have been presented at the trial. Applicant is required to rebut the presumption that there has been a lack of diligence. 39 Am. Jur. Sec. 156, p. 163. Subsequent discovery of the importance of evidence which was in the possession of applicant for new trial, at the time of the trial, does not entitle him to a new trial upon the ground of newly discovered evidence. 39 Am. Jur. Sec. 159, p. 166. The application for a new trial will be

denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been exercised prior thereto. 39 Am. Jur. Sec. 161, p. 168". (Italics ours.)

In *Taylor v. Ross*, 10 A. L. R. 2d 377, 380, the Court stated:

"Headnote 3. The rule to be deduced from the cases is that where newly discovered evidence is of such conclusive nature, or of such decisive or preponderating character, that it would with reasonable certainty have changed the verdict or materially reduced the recovery, a new trial should be granted if it is satisfactorily shown why the evidence was not discovered and produced at the time of the trial."

In the syllabus in the case of *Sheen v. Kubiac*, 131 Ohio St. 52, 1 N. E. 2d 943, 944, this Court held:

"To warrant the granting of a motion for a new trial based on the ground of newly discovered evidence, it must be shown that (1) the new evidence must be such as will probably change the result if a new trial is granted, (2) it must have been discovered since the trial, (3) it must be such as could not in the exercise of due diligence have been discovered before the trial, (4) it must be material to the issues, (5) it must not be merely cumulative to former evidence, and (6) it must not merely impeach or contradict the former evidence."

39 Am. Jur. 168, Sec. 161, states as follows:

"The question as to whether or not the party's failure to produce the newly discovered evidence at the trial was attributable to negligence or *want of diligence* is to be resolved, of course, in view of the circumstances of the case." Very evidently, if it is to be concluded that he possessed, prior to the trial, no means of knowing that the evidence was obtainable, he is not chargeable with lack of diligence."

"No fixed standard can be established for the measurement of every case and no iron bound rule prescribed; each case must be governed by the circumstances surrounding it. State v. Stowe, 3 Wash. 206, 28 P. 337, 14 LRA 609.

"Henderson v. Edwards, 191 Iowa 871, 183 NW 583, 16 ALR 1090.

"A new trial on the ground of newly discovered evidence in a homicide case will not be denied for lack of diligence where the defendant is a poor, ignorant, obscure tramp, tinker without money, standing, friends, or even acquaintances, and who was shut up in jail, obliged to rely on the efforts of counsel appointed to defend him, and some diligence is shown, although an important part of the newly discovered evidence, which is to show an alibi, is that of a person at whose house the defendant called on the day of the homicide. State v. Stowe, 3 Wash. 206, 28 P. 337, 14 LRA 609.

"Discovery of documentary evidence after trial. Diligence in seeking evidence from a yard master with relation to the transfer of animals in the yard, to justify a new trial for newly discovered evidence, is shown by testimony that he was approached before trial, but stated that he had no recollection of the transaction, but after the trial he discovered a

record which showed how the transfer was made. Guth v. Bell, 153 Iowa 511, 133 NW 383, 42 LRA (NS) 693, Ann. Cas. 1913 E 142."

In *King v. Leach*, CCA 5, 131 F. 2d 8, 9, it was said:

"Appellant further contends that the court erred in refusing to grant her motion for a new trial which motion was based on the ground of newly discovered evidence. In Federal Courts it has long been established that motions for a new trial are addressed to the sound discretion of the trial court and that the ruling on such motion will not be disturbed by an appellate court unless it constitutes a manifest abuse of discretion. This appellant has had her day in court, and the alleged newly discovered evidence was of such character that it could have been presented at the trial by the exercise of reasonable diligence. The trial court did not abuse its discretion in overruling the motion for a new trial, and this court will not disturb its ruling. Indianapolis & St. Louis R. Co. v. Horst, 93 U. S. 291, 23, L. Ed. 898; Teche Lines v. Boyette, 5. Cir., 111 F. 2d 579."

The above referred to opinion does not state the kind and nature of the evidence discovered, nor does it state the facts in regard to the diligence claimed by movant in discovering the same.

66 C. J. S., 307, Sec. 108, states as follows:

"On the other hand, failure to produce evidence may be excused where reasonable diligence would not have led to an earlier discovery of the evi-

dence.[79] So also the fact that a party moving for a new trial for newly discovered evidence, consisting of a receipt for the debt sued on, said nothing in his testimony of the receipt does not preclude a new trial if satisfactorily explained by showing that he had thought it lost;[80] and in other cases the excuse for apparent lack of diligence has been held sufficient.[81]

[79] "Ark.-Forsgren v. Massey, 16 S. W. 2d 20, 185 Ark. 90.
Okla.-Kennedy v. Chadwell, 112 P. 2d 979, 193 Okla. 304.
S. D.-Hasbrill v. Great Northern Copper Co., 235 N. W. 607, 58 S. D. 259.
Iowa-Mullong v. Mullong, 159 N. W. 994, 178 Iowa 552.
[81] "N. E.-Brantley v. Atlantic Coast Line R. Co., 190 S. E. 721, 211 N. C. 154.
Pa.-Loop v. Ohlm, Com. Pl., 25 Erie Co. 288.
[80] "46 C. J. 250, note 67."

In *Henderson v. Edwards*, 16 A. L. R. 1090, 1092, the Court held:

> "A party to a suit may not be accused of a lack of diligence when he possesses no means of knowing that the evidence subsequently discovered was previously obtainable. State v. Lowell, 123 Iowa, 427, 99 N. W. 125."

Also, in *Tozer v. Charles A. Krause Milling Co.*, 189 F. 2d 242, 245, the Court stated:

> "What is excusable neglect and what is inexcusable neglect can hardly be determined in a vacuum. The opinion of the court below does not reveal what standard was applied nor what factors were weighed. The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Henry v. Metropolitan Life

Ins. Co., D. C. Va., 1942, 3 F. R. D. 142, 144. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. Huntington Cab Co. v. American Fidelity & Casualty Co., D. C. W. Va., 1945, 4 F. R. D. 496, 498; Standard Grate Bar Co. v. Defense Plant Corp., D. C. Pa., 1944, 3 F. R. D. 371, 372. Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant consideration should courts refuse to open default judgments. We are of the opinion that the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside."

And in 46 C. J. 257, Sec. 227, it is said:

"On the other hand, that a party moving for a new trial for newly discovered evidence, consisting of a receipt for the debt sued on, said nothing in his testimony of the receipt, does not preclude a new trial if satisfactorily explained by showing that he had thought it lost. And in other cases the excuse for apparent lack of diligence has been held sufficient."

The 5th Circuit in *English v. Mattson*, 214 F. 2d 406, 409, said:

"He (referring to the trial court) stated that he was unable to arrive at any intelligent view of Haywood's testimony, either on the trial or at the hearing; but held that the new evidence—that Haywood was in the penitentiary during 1951—was merely for impeachment and would not change the

result. We are in full accord with the trial judge's view." (Italics ours.)

Also see *F. W. Woolworth Co. v. Seckinger*, 125 F. 2d 97, 98, which held:

> "It is well settled that motions for a new trial on the ground of newly discovered evidence must do more than merely seek to relitigate the new issues and cannot be allowed where the new evidence is *merely for the purpose of corroboration.*" Citing *Slappey v. U. S.*, CA5, 110 F. 2d 528 and other cases. (Italics ours.)

The 5th Circuit reversed a District Court of Florida in *Prudential Ins. Co. v. Gilroy*, 154 F. 2d 382, for refusal to grant a new trial for newly discovered evidence. In this case, the appellant had appealed from a judgment against it on two life insurance policies after a new trial was denied for newly discovered evidence. The factual issue was whether the policies had lapsed for nonpayment of premiums, and beneficiary's proof in the case was largely predicated on a receipt reputedly signed by the insurer's agent. This receipt had been produced two days before the trial. After the trial, the insurance company produced an affidavit of a handwriting expert that the receipt was a forgery and the motion for a new trial was based upon this, as new evidence. The trial judge denied the motion because the forgery would not have destroyed the effect of a premium payment of another date, but the 5th Circuit held this was error and reversed and granted a new trial, assigning as a reason the fact that the credibility of the beneficiary

on other evidence would be seriously impaired if forgery of the receipt was established.

As we have undertaken to show, the new evidence *does not operate to impeach, is not cumulative*, and *a different result on the new trial will probably be reached on this new evidence.*

It is impossible to conceive of Serio being guilty both of lack of diligence and negligence.

The fight put up by Serio to win the case, the diligence he showed in combatting the multiple attacks upon him are evidence he did not lack in diligence in preparing for the trial. A number of the cases wherein Rule 60-b has been invoked are where default judgments have been set aside for surprise or excusable neglect for lack of appearance at the trial itself. Serio did not default in his appearance for this trial, but he is somewhat in the position of a defaulting defendant in that he defaulted in doing what his insurance contracts provided for him to do, to-wit: produce original records to prove the contents of his building. Every factor on his motion for relief points to corroborating Serio in his allegations of ignorance of the existence of the records at the time of the trial, of his lack of knowledge of them and of his good faith in believing them *destroyed*. The courts favor a liberal construction of any rule that operates to dispense justice and a fair determination of the merits of the case. This new evidence will establish to an exact certainty the contents of the building on the day fire destroyed it in September 1955.

We submit with deference that this Honorable Court has already decided the very question presented in this case by its decision in *Klapprott v. United States*, 335 U. S. 601, 93 L. Ed. 266, 69 S. Ct. 384 wherein this Court said:

> "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly 615 specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. * * * And all petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. Petitioner is entitled to a fair trial. He has not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental concepts of justice, and the language of the 'other reason' clause of 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing."

Neither is the decision of the Court of Appeals in conflict with the decisions of the Supreme Court of Mississippi with reference to the granting of a new trial where such action is appropriate to accomplish justice.

In *Blakeney v. State*, 228 Miss. 162, 87 So. 2d 472, Blakeney had been convicted on a charge of fraud and embezzlement in paying a person employed by him for county work out of county district funds while at the same time he had the employee working on his private

farm for seven and one-half days. After the conviction, Blakeney found a receipt showing payment of the amount to the employee out of his own private funds. He made a motion for a new trial on the grounds of the newly discovered evidence embraced in this receipt. The trial court refused to grant a new trial. The Supreme Court of Mississippi reversed the action of the trial court, granted a new trial, and in so doing said

> "But, aside from the question of whether or not the accused was entitled to a continuance for the term, we are of the opinion that the motion for a new trial should have been sustained in view of the finding by the accused in his home of the unexplained receipt of Earnest Blakeney for the sum of $24 for eight days' labor. It was thought by the trial judge that this receipt did not constitute newly discovered evidence, and that for this reason the motion for a new trial was not well-taken. But we are of the opinion that this receipt falls within the category of a lost instrument of writing as of the time that the case was tried. If the defendant had had the receipt in his possession during the trial, and had known of its whereabouts, or had failed to make a reasonable search to locate the same, and had purposely withheld it from the jury during the trial, we would have a different situation. But there is nothing in the record to indicate that he knew that this receipt was at his home during the trial of the case. Most assuredly if he had known it was in his home and could have been located before the trial, he would have produced it for introduction at the trial, since the receipt unexplained by the signer thereof tends to strongly

corroborate the testimony of the accused and his four witnesses that Earnest Blakeney was paid in cash for the farm labor. A receipt for money which an accused may have forgotten to have been taken, or which he was unable to locate after two years from the time of the occurrence, is, in our opinion, newly discovered evidence. If it was in his possession, and he did not recall its existence or its whereabouts after such a long time, and did not locate it in his search of his belongings for anything that would support his defense, it was the same as if he did not have it in his possession until after his conviction.

"We have, therefore, concluded that it was error (1) to deny the application for a continuance, and (2) to overrule the motion for a new trial."

There is no conflict of decision between the decision of the Court of Appeals for the Fifth District and with that of any other Court of Appeals on the same matter. Neither has the Court of Appeals decided an important state question in a way in conflict with applicable state or territorial law, nor has it decided an important question of Federal law which has not been but should be settled by this Court, nor has it decided a Federal question in a way in conflict with applicable decisions of this Court, nor has it so far departed from the accepted and unquestioned course of judicial proceedings or so far sanctioned such a departure as to call for an exercise of this Court's power of supervision. Hence, there is no ground under Rule 19 for the granting of

the petition for certiorari in this case, and such petition should be denied.

Respectfully submitted,

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CERTIFICATE.

The undersigned of counsel for respondent certified that a true and correct copy of the brief for the respondent in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon Hon. Thomas H. Watkins and Hon. Elizabeth Hulen Grayson of the firm of Watkins & Eager of Jackson, Mississippi, attorneys of record for petitioners, by depositing the same in the United States Post Office or mail box with first class postage prepaid, properly addressed, in strict accordance with Rule 33 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954.

This the 27 day of August, 1959.

Malcolm B. Montgomery

MALCOLM B. MONTGOMERY,
Of Counsel for Respondent.

APPENDIX "A".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,358.

SAM SERIO, D B A MAGNOLIA CANNING COMPANY,
Appellant,

versus

BADGER MUTUAL INSURANCE COMPANY AND NORTHWESTERN MUTUAL FIRE ASSOCIATION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

(May 5, 1959.)

Before Hutcheson, Chief Judge, and Rives and Jones, Circuit Judges.

Jones, Circuit Judge: Among other business ventures the appellant, Sam Serio, had operated a canning factory at Magnolia, Mississippi, since 1939, under the name of Magnolia Canning Co. The operation was seasonal, beans being canned in the Spring and sweet potatoes in the Fall. On June 11, 1939 Badger Mutual Insurance Company, one of the appellees, issued to the appellant a policy of fire insurance on the canned vegetables, materials and supplies in the canning plant in the amount

of $35,000. On July 18, 1955, Northwestern Mutual Fire Association, the other appellee, issued a policy against the same risks in the amount of $25,000. The Badger policy incorporated a reporting form requiring the insured to make monthly reports. The Badger policy and the Northwestern policy each contained an Iron Safe Clause which provided, among other things,[1] that inventories would be taken at annual or more frequent intervals and a set of books would be kept showing the business transacted. The clause required that the inventory and books be kept in a locked fire-proof safe at night and at all times when the building was not open for business, or that the inventories and books be kept in some place which would not expose the records to a fire which might destroy the building in which the insured goods were kept.

The canning factory of Serio was destroyed by fire on the night of September 24, 1955. As permitted by the policies, the insurance companies examined the in-

[1] "1. The insured will take a complete itemized inventory of stock on hand at least once in each calendar year. * * *.

"2. The insured will keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and during the continuance of this policy.

"3. The insured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the insured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

"In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

sured, Sam Serio, and his bookkeeper, Miss Fannie Lederer, under oath. From these examinations it appeared that the safe contained but one inventory, rather than the two that should have been produced, and contained no books. It was said by Miss Lederer that she had inadvertently left other inventories and the books out of the safe before the fire. It was assumed that they had been destroyed in the fire.

The insurance companies filed suit seeking a declaratory judgment that the Iron Safe Clause in the policies had been violated and that they owed nothing to Serio on account of his fire loss. Serio counterclaimed for the full amount of each policy. At the conclusion of the evidence both Serio and the insurance companies moved for a directed verdict. At the argument on these motions the trial judge said, among other things, "* * * it will suffice to say here that those books were not kept by Mr. Serio in the iron safe and were destroyed * * *. But in these insurance policies, it is a contract, and the contract requires that that be complied with, and unless it is waived, then it must be complied with to the extent that those books and records will substantially show the amount of the loss at the time of the fire. They have not been able to be produced and have never at any time been produced because they were destroyed by fire. So, there was no compliance." The court directed a verdict for the insurance companies. On September 13, 1957, a judgment for the insurance companies was entered. The foregoing excerpts from the court's oral opinion indicate that the judgment was entered upon the sole ground that Serio had not com-

plied with the Iron Safe Clause. Motions for a judgment notwithstanding the verdict and, in the alternative, for a new trial, were filed. These were overruled and in a letter opinion the district court again stated its conclusion that the Iron Safe Clause had been breached with the result of invalidating the policies. A notice of appeal from the judgment was filed March 11, 1958. In specifying error Serio asserts that there was a substantial compliance with the Iron Safe Clause, that the contents of the building and the value thereof could be established by other evidence.

On April 2, 1958, after the notice of appeal had been filed but before the transcript of the record in this appeal had been prepared, Serio filed a motion in the district court under Rule 60(b)(1)(2).[2] In the motion and affidavits filed with it were recitals that a few days before the fire while working on the books Miss Lederer, Serio's bookkeeper, received a message calling her to the bedside of her sister who was seriously ill in Wisconsin. In her excitement she left the books on the top of a cabinet. During her absence Serio told Glen Varnado, an illiterate employee, to move some old unused record books from the office to a storage room which was back of the boiler room of the canning

[2] On motion and upon such terms as are just, the court may relieve a party of his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); * * *. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *" Rule 60(b), Fed. Rules Civ. Proc., Title 28, U.S.C.A.

factory. Varnado moved the unused books and also, without the knowledge of Serio, moved the books, records, inventory and canceled checks of the canning factory. Not knowing the books and records had been moved out of the building, Serio and Miss Lederer assumed they had been destroyed in the fire. On March 14th, three days after the notice of appeal, Serio went to the store room looking for a usable ledger among the unused lot of books he had asked Varnado to move. The books, records, inventory and canceled checks of the canning factory were then found with the unused books. The motion asked for a new trial at which the books and records could be offered in evidence. The court overruled the motion and in a letter opinion assigned its reasons for the ruling in this language:

"It was the duty of Serio to present these records within a reasonable time, which he failed to do. His excuse for the failure is not sufficient in law to comply with the terms of the policy. The documents were in the possession of Serio and his failure to produce them within a reasonable time was his own fault. It was his employee who misplaced the records and the negligence of this agent of his would be imputable to Serio. He failed to show due diligence in finding them. Under his own affidavit it should have occurred to him immediately, as a reasonably prudent person, that this employee of his had misplaced them and he should have searched the place at that time where he subsequently located them. I am therefore of the opinion that the showing for newly discovered evidence is insufficient."

From the order overruling the motion Serio has appealed. The case is before us on the appeal from the judgment and from the order overruling the motion filed under Rule 60(b)(1)(2).

This Court has jurisdiction of the appeal from the order denying the motion filed under Rule 60(b) notwithstanding the fact that the notice of appeal from the judgment on the merits had been filed prior to the filing of the motion. *Ferrell v. Trailmobile, Inc.*, 5th Cir. 1955, 223 F. 2d 697.

The sole basis for the direction of verdicts and the entry of judgments for the insurance companies was the failure of the insured Serio to comply with the Iron Safe Clause. The Rule 60(b) motion, filed less than seven months after the judgment, alleged that the books and records had been found and there had not been, in fact, any breach of the Iron Safe Clause. The sole basis for the denial of the motion was a failure of the insured to find and produce the records at an earlier time. No prejudice to the insurance companies is shown to have resulted from the delay in the discovery of the evidence. Under the circumstances the delay in the filing of the motion was not unreasonable. See *Klapprott v. United States*, 335 U. S. 601, 69 S. Ct. 384, 93 L. Ed. 266. The rule is to be liberally construed in order that judgments may reflect the true merits of a case. 3 Baron & Holtzoff, Federal Practice and Procedure, Rules Ed., 392, Sec. 1322. It seems that Serio owned property, that the insurance companies for premiums paid by him, issued to Serio policies insuring him

against the risk of loss or damage by fire, and that a fire destroyed or damaged all or a part of the insured property. He was deprived of the right to attempt to prove that he had sustained a loss within the terms of the policies, and the amount of his loss sustained, because of the Iron Safe Clause. That impediment, he asserts by his motion, is now removed. The district court was of the belief that it should have occurred to Serio that the books and records had been inadvertently (although fortuitously) moved by one employee after having been inadvertently left out of the safe by another employee. The district court held that a prudent person would have searched for the records at the place where they were subsequently found by accident. We do not agree. Serio asserts that he believed and we think he was entitled to believe that the records had been burned. So believing, a prudent person would not have been expected to conduct a search.

The ends of justice require that a new trial be granted. *Ferrell v. Trailmobile, Inc., supra.* There is no occasion for our consideration of the specifications of error with respect to the judgment. It is improbable that the questions will recur on another trial. In order that there may be a new trial, the judgment is

VACATED AND REMANDED.

A True copy. Test: s/ Edward W. Wadsworth.

(Seal) Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

June 18, 1959.

APPENDIX "B".

ORAL OPINION OF THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION, DIRECTING JUDGMENT FOR PETITIONERS (R. 565).

By the Court: The policy sued upon here contained this clause:

"1. The insured will take a complete itemized inventory of stock on hand at least once in each calendar year and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within 30 days of issuance of this policy; or this policy shall be null and void * * *" and so forth.

"2. The insured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and during the continuance of this policy."

"3. The insured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the insured will keep such books and inventories in some place not exposed to a fire which would destroy the

aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void. * * *"

In this case, the evidence shows without conflict an inventory was taken in June, 1955, and an inventory was taken on June 30, 1954. The 1955 inventory was preserved, but the 1954 inventory was destroyed by the fire, and the books of the company were destroyed by the fire. So the law is well settled that unless the insured complies with that provision of the insurance policy, unless it should be waived by the company, then it is binding and will destroy the effect and validity of the policy. The law is well announced in the case of *World Fire Insurance v. King*, 191 Southern 665, where the Court says, among other things, "* * * and would enable it if complied with, to trace the transactions reflected by the books so as to verify the truth of the matters contained therein and to determine with more or less precision the real amount of the loss incurred by the fire under the policies. Of course, one of the essential things, the most important thing of all, is the production of the inventory, books of account, records of sale, shipments and so forth, so that the transactions might be investigated and the loss be determined with relative precision." Then, the case of *Central Manufacturers Mutual Company v. Rosenblum*, 177 Southern 909, which is as a matter of fact, a case very similar to the facts of this case. That was a case wherein the insured would take some of the stock of goods from his store in Gulfport and transfer them over to Poplarville

where he had another store and did not make an entry of that transfer. If he didn't sell them in Poplarville, then he eventually would bring them back to Gulfport, his main store, and put them on sale again there. Those entries were not made on the books, and here is what the Court said: "It has been the law in this state that the books of the assured must themselves furnish the information required by the policy with reasonable certainty, unaided by oral testimony except to explain the method of keeping them, and that the removal by the assured of a considerable portion of the stock to another store without entering the same on his books of account violates the policy provision requiring the keeping of a set of books showing all the purchases, sales and shipments and avoids the policy."

So, gentlemen, there are other cases along those lines, quite a number of them, which I will not refer to here; but it will suffice to say here that those books were not kept by Mr. Serio in the iron safe and were destroyed, and he undertakes to prove by oral evidence and by copies of documents that would reflect upon it the amount of his loss. If oral evidence were permitted to be shown, why, it could be done; and if this were an accounting proposition for income tax purposes where an accountant could go out to the fellow whose name appeared on the check and say, "Did you sell this man some material for which this check was given, and, if so, what?", then you could prove it by oral testimony. But in these insurance policies, it is a contract, and the contract requires that that be complied with, and unless it is waived, then it must be complied with to the

extent that those books and records will substantially show the amount of the loss at the time of the fire. They have not been able to be produced and have never at any time been produced because they were destroyed by fire. So, there was no compliance.

So then, we come down to whether or not there was a waiver of those provisions. The evidence in the case is insufficient to show there is a waiver. While it takes only a small amount of conduct or circumstances to constitute a waiver, yet those circumstances must show there was an intent to waive, because the law of waiver is that there must be an intent to waive a known right; otherwise, it wouldn't amount to a waiver. In these insurance policies, only a slight circumstance is required to show intent to waive, but here, taking Mr. Serio's testimony at full value, which I must do, it shows no intent to waive and shows no circumstances from which a waiver could be inferred. The testimony was the general agent of the company came to his place of business rather often and saw his books, which was in the daytime when they were at work, saw his books out on the desks or on the tables, made no complaint about it and either told him or his bookkeeper that he was keeping a good set of books, was well pleased with the way he was keeping them; but at no time was it ever told the insurance agent that the books were not locked up in the safe at night, and there is nothing in the testimony of the case from which it could be inferred that the agent knew the books were not kept locked up in the safe at night. So, therefore, there was no waiver.

So, I will give the peremptory instructions requested by the plaintiff in the case, the insurance companies, and will deny the instruction requested by the cross-plaintiff and defendant, Mr. Serio, and declare that the policies were of no validity at the time of the fire.

Appropriate order may be drawn and mailed to me and I will sign it.

Gentlemen, I will say this: Of course, under the rules the losing party has ten days within which to file a motion for a new trial or a motion for judgment notwithstanding the verdict. You may do that, and I will let you brief it, give you a reasonable time in which to brief it if you so desire. I might say further for the record, from the testimony in this case I think Mr. Serio did sustain a substantial loss, but that he has been unable to prove it by any method provided by law or authorized by law.

APPENDIX "C".

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
GULFPORT, MISSISSIPPI

February 20, 1958

Chambers of
SIDNEY C. MIZE
District Judge

(Filed Feb. 20, 1958.)

Honorable O. W. Phillips
Magnolia, Mississippi
Messrs. Barnett, Jones & Montgomery
Jackson, Mississippi
Messrs. Watkins & Eager
Jackson, Mississippi

Re: Badger Mutual Insurance Co., et al
v. No. 2421—Jackson
Sam Serio

Gentlemen:

I have considered your briefs and the record in the above styled case upon the motion of the Plaintiff for a judgment notwithstanding the verdict and also the motion for a new trial in lieu thereof, and I have reached the conclusion that each of these motions must be overruled. I adhere to the summary I made at the conclusion of the trial:

The record is replete with testimony that the insured did not comply with the iron-safe clause. The policies, among other things, provided that the insured would take a complete, itemized inventory of stock on hand at least once in each calendar year and unless such inventory had been taken within twelve months prior to the date of the policy, one would be taken in detail within thirty days of the issuance of the policy or the policy would become null and void from its date. Also it provided that he would keep a set of books which would clearly and plainly present a complete record of the business transacted, and further provided that the insured would keep such books and inventory, and also the last preceding inventory—if such had been taken—securely locked in a fire-proof safe at night and at all times when the building mentioned in the policy was not actually open for business. Or, failing in this, he would keep them in some place not exposed to a fire which would destroy the building. It further provided that in the event of the failure to produce such books and inventory for the inspection of the Company that the policy would be null and void and a perpetual bar to any recovery thereon.

The evidence in the case discloses that an inventory was taken on December 31, 1954; it also discloses that it took an inventory on June 30, 1955. This last inventory was produced, but the inventory of December 31, 1954, was not kept in the safe and was destroyed by the fire. Likewise, the cash book was destroyed by fire and it was impossible to determine from the records themselves the actual value of the goods that were

destroyed by fire, unless it could be supplemented by oral testimony. The accountant, Gallagher, testified that without the aid of the oral evidence he could not determine with a reasonable degree of accuracy the amount of the loss sustained.

It is unnecessary to go outside the authorities announcing the law in the State of Mississippi by the Supreme Court of Mississippi. The Supreme Court of Mississippi has on many occasions announced the law with reference to compliance with the iron safe clause or the failure to comply therewith. The cases cited at the time I summarized were sufficient to sustain the ruling that I made, but there are many other authorities, some of which I will cite.

World Fire & Marine Insurance Co. v. King, 191 So. 665, in which the Court said that it was necessary to produce the inventories, books and records of the transaction of the business for inspection and examination by the insurer, which would enable it, if complied with, to trace the transactions reflected by the books so as to verify the truth of the matters contained therein, and to determine with more or less precision the real amount of the loss incurred by the fire under the policy. That one of the most essential things was the production of the inventories, books of accounts, records of sales, etc. was held in the case of *Lewis v. National Fire Insurance Company*, 101 So. 296, in which the court denied recovery for the failure of the insured to take a complete, itemized inventory of the stock on hand at least once a year, or within thirty days after the

issuance of the policy. This the insured in this case failed to do, and the Court held further that no mere proof that there was some merchandise or a large stock of merchandise in *situ* at the time of the fire could be substituted for an inventory. In the case of *Penix, Trustee v. American Central Insurance Co.*, 63 So. 846, the Court held that in order for the iron safe clause to be complied with it was only necessary that the insured keep such a set of books as would enable an accountant to ascertain from them, together with the inventory, with reasonable accuracy the value of the goods at the time of the fire. See also Phoenix Insurance Co., 13 Fed. (2) 612; *Aetna Insurance Co. v. Mount*, 44 So. 162.

The Supreme Court of Mississippi, in the case of *Merchants Union Insurance Co. v. Johnson*, held that in order to comply with the iron safe clause the book or books must themselves furnish information with reasonable certainty without the aid of parole testimony or loose leaf memoranda collected from other sources. This is the same rule of law as announced in the *Rosenblum* case which I cited at the time of my former ruling, 177 So. 909. The same doctrine was announced in the case of *Merchants Union Insurance Co. v. Johnson*, 135 Miss. 311. All the above cases are from the Supreme Court of Mississippi except the *Wright* case, which was a Mississippi Case decided by the Court of Appeals. These authorities are conclusive that there was not a compliance with the iron safe clause.

The evidence was far from showing that there was a waiver of the iron safe clause by the companies and the case of *Continental Insurance Company v. Thrash*, 78 So. (2) 344, is not in point. In that case it was conclusively shown that there was a waiver by the General Agent of the Company who knew the type of books and records that would be kept by the insured if the policy was delivered. The insured explained to the agent just how he kept his books and the agent, with the general knowledge and full knowledge of how the books were kept, accepted that as sufficient. Definitely in that case there was a waiver by the company itself. In the present case the testimony nowhere shows that the Company, through any of its agents, ever waived the clause of the policy requiring that the records, books and inventories be kept locked in an iron safe at night.

As above stated, each of the motions will be overruled and an order may be drawn in accord herewith. I had hoped to find the time to write an opinion and go more into detail as to the testimony, but for lack of time I will not do so, but will file a copy of this letter with the Clerk of the Court as my opinion and part of the record in this case.

With kindest regards, I am

Sincerely yours,
s/ S. C. Mize
U. S. District Judge

APPENDIX "D".

LETTER OPINION (R. 632)

(Filed June 9, 1958.)

June 6, 1958

Honorable P. Z. Jones
414½ East Capitol
Jackson, Mississippi
Honorable Tom H. Watkins
Plaza Building
Jackson, Mississippi

Re: Badger Mutual Ins. Co., et al
v. No. 2421—Jackson
Sam Serio, etc.

Gentlemen:

I have considered Mr. Jones' motion on behalf of Defendant and Cross Plaintiff to set aside the judgment heretofore entered in this case and to re-open the case for further evidence and Mr. Watkins' motion on behalf of the Plaintiff to strike this motion, along with the entire record and your briefs, and have reached the conclusion that both motions should be overruled.

Serio had the right to file this motion and I am treating Mr. Watkins' motion to strike along with it. I do not believe the motion should be stricken, but am of the opinion that Serio's motion should be overruled and denied.

Assuming, for the purpose of this opinion, that the documents now tendered are original records, in my judgment their production at this late date would not be sufficient to avoid forfeiture of the policy. It was the duty of Serio to present these records within a reasonable time, which he failed to do. His excuse for the failure is not sufficient in law to comply with the terms of the policy. The documents were in the possession of Serio and his failure to produce them within a reasonable time was his own fault. It was his employee who misplaced the records and the negligence of this agent of his would be imputable to Serio. He failed to show due diligence in finding them. Under his own affidavit it should have occurred to him immediately, as a reasonably prudent person, that this employee of his had misplaced them and he should have searched the place at that time where he subsequently located them. I am therefore of the opinion that the showing for newly discovered evidence is insufficient.

I am filing a copy of this letter with the Clerk as my opinion upon these motions. An order may be drawn in accord herewith and mailed to me for signing.

Sincerely yours,

s/ S. C. Mize

APPENDIX "E".

JUDGMENT.

Extract from the Minutes of May 5, 1959.

No. 17358

SAM SERIO, d b a MAGNOLIA CANNING COMPANY,

vs.

BADGER MUTUAL INSURANCE COMPANY and NORTHWESTERN MUTUAL FIRE ASSOCIATION.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and it is hereby, remanded to the said District Court for a new trial.

It is further ordered and adjudged that the appellees Badger Mutual Insurance Company and Northwestern Mutual Fire Association, be condemned, *in solido*, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX "F"

ORDER DENYING REHEARING

Extract from the Minutes of June 4, 1959

No. 17358

SAM SERIO, d b a MAGNOLIA CANNING COMPANY,

vs.

BADGER MUTUAL INSURANCE COMPANY and NORTHWESTERN MUTUAL FIRE ASSOCIATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.